ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act	)	
of 1996	)	

OPPOSITION OF AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION TO THE JOINT MOTION OF GTE CORPORATION AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

America's Carriers Telecommunication Association ("ACTA") opposes the Joint Motion of GTE Corporation ("GTE") and Southern New England Telephone Company ("SNET") for a stay of the rules adopted in this docket until review by the Court of Appeals ("Joint Motion"). The Commission should affirm its interpretations of the Telecommunications Act of 1996 (the "Act") and the decisions based on those interpretations in the First Report and Order in this docket, August 1, 1996, released August 8, 1996 (the "First Report"). The stage will then be set for GTE and SNET to seek a stay before the Court of Appeals.

Contrary to GTE and SNET's assertions, their submission does not meet the four-prong test for granting a stay. In their zeal to be able to conduct their "negotiations" in the more monopoly friendly, if not co-opted, environment of the state regulatory system, GTE and SNET and their incumbent LEC brethren, the Bell Operating Companies ("BOCs") (collectively, the "ILECs"), hope to write the Commission out of the Act's implementation effort.

The Commission should see this effort for what it is. The ILECs wish to dominate the new order by using the state regulatory bodies which they continue to believe will favor their interests over competition and to turn fundamental changes in telecommunications regulation into a retreat into the past. They further intend to define "competition" in their usually distorted and twisted manner by lauding the benefits of competition, mouthing pious phrases of their having embraced competition while, in reality, using every scheme and device available to blunt, delay, dominate and control competition so that, should any competition actually take place in the distant future, it will be weak and ineffective.

As is even more typical, the ILECs, while doing their best to stymie local competition, fully expect to march into the arena of long distance competition without missing a step. Were this to

occur, the purposes of the Act and the goals it is intended to reach will be frustrated and the pro-competitive policies underlying it will be made a mockery.

GTE's and SNET's filing demonstrates bad faith. The Commission should dismiss the Joint Motion and adopt an order that prohibits either company from any further efforts to market and/or provide long distance services in any of their local operating territories.

ARGUMENT

I. THE COMMISSION IS ACTING WITHIN ITS AUTHORITY AND HAS ACTED REASONABLY AND IN THE PUBLIC INTEREST.

The purpose of the Act is to foster competition in all segments of the telecommunications industry including, and especially, in the last preserves of monopoly-controlled local exchange services. Wisely recognizing that achieving this goal will not be easy under the delegation of authority provided to 51 separate jurisdictions, the Commission, in the exercise of its federal authority and its exclusive jurisdiction over interstate and international communications, adopted reasonable guidelines by which to evaluate and adjudicate the development of local competition. Not liking the Commission's approach, the ILECs seek to deny the Commission any role. But their argument proves too much.

A. Denying the Commission a Role in the Implementation of the Act Was Not Intended by Congress and Would Be Unconstitutional.

If, as suggested by the ILECs, Congress intended to divest the Commission of its exclusive jurisdiction over interstate and international communications, then it may have acted in a manner which raises constitutional questions. Congress cannot readily be interpreted as having delegated, under the Commerce Clause,[1] the regulation of an enterprise with inherent federal interests to 51

[1] Article I, Section 8, Clause 3, U.S. Constitution.

separate and distinct jurisdictions. The burden on interstate commerce, not to mention international commerce, of such a scheme would be intolerable and unworkable.[2]

Nor can one find in the legislative history any intent by Congress to override the federal antitrust laws. To the contrary, Congress specifically preserved the application of such laws. Section 601(b) of the Act. Further, the Act is designed to produce competition on a national scale. In light of this overriding goal, it is preposterous to suggest, as the ILECs do, that the Commission was to have no role in achieving it, given the relationship of the local exchange bottlenecks to increased national competition. GTE and SNET are hallucinating when they argue that section 251 cannot "be read to confer authority on the Commission to regulate purely local matters." Joint Motion @ 11. Emphasis in original. In the new age of competitive telecommunications intended to be ushered in by the Act, no longer is there any preserve of "purely local" interests. Rather, matters of local concern may be accommodated without interfering with national objectives. That Congress wants the states, in the first instance, to attempt to reach those accommodations, is not an

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[2] The arguments based on section 2(b) of the Act and Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) are misplaced (Joint Motion @ 9-10). Taken together, these arguments have the ILECs singing the same old song with a slightly different, but still discordant, melody. See, California vs. FCC, 567 F.2d 84, 86 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978). Where there are distinct state interests, segregable from federal concerns, the ability to exclude state action has its limits. This is not such a case. What is produced by the Commission's policies is the ability of all industry participants to compete in a newly seamless fashion, where the old distinctions of intrastate and interstate services are no longer to be emphasized. Ample precedents exist that demonstrate that the ILECs' approach has the matter completely backward. It is not the states' authority that prevails in the new environment. Neither is it 51 jurisdictions deciding how interstate and international competition is to be played out, albeit, now in combination with local service. Rather, it is how local service competition is to be played out as part of interstate and international service offerings. Congress did not and could not eradicate federal jurisdiction over something so fundamentally interstate in character as communications, regardless of its desire to give state authority a voice in helping to affect national goals.

indication that national policy-making was to be divested; nor is it a wholesale delegation of authority to the states.

B. There Has Been No Taking.

The ILECs argue that the Commission's "TELRIC" pricing standard constitutes a confiscation of their property and, hence, is unconstitutional. Joint Motion @ 12. The ILECs have not shown any taking or even harm. Rather than providing evidence, the Joint Petition provides sworn statements from in-house economists who simply disagree with the cost models and economic theories relied on by those economists which support the use of TELRIC pricing as an essential element to true local competition.

Here again, the ILECs tend to prove too much. Logically, there can be no competition with a pricing system that does not exclude embedded costs and a portion of joint and common costs, and by requiring their exclusion, the ILECs will have their property confiscated, then there can be no local competition and the Act is a nullity. The self-serving nature of the ILECs' concerns may be seen from their companion arguments. To get around established precedents unfavorable to their theories (Joint Motion @ 15), the ILECs must distinguish these precedents on the basis of a speculative syllogism. Recognizing that prior rate cases establish that monopoly carriers are not guaranteed a profit on each service they offer, the ILECs are attempting to reject the meaning of these precedents. The ILECs argue that these cases are based on the theory that each service need not return a profit because overall, as a monopoly carrier, a profit would be made on other services that would cover the "profit shortfall" on specific services. However, the ILECs state they are no longer monopolies. Therefore, not only are these rate case precedents not applicable, but irrelevant in evaluating the "unconstitutional taking" arguments made by them as well.

First, the ILECs are incorrect that they are not still monopolies. Second, they will, in all likelihood, remain so unless prudent implementation policies are adopted and enforced (like TELRIC). Third, when they cease being monopolies and competition has gained a place in the market, the need for TELRIC-type policies may be replaced. Fourth, the ILECs conveniently ignore the fact that their embedded costs and the totality of joint and common costs have been paid for many times over by captive ratepayers.

The arguments about confiscation are then attackable on several fronts. They lack evidentiary support. The self-serving affidavits of the ILECs' in-house economists are insufficient because they are based on predictable disagreement with contrary economic theory and are based on specific approaches to cost manipulations which permit any number of self-serving predetermined conclusions to be reached.

The ILECs' arguments raise another issue: if they are taken as true, that the ILECs cannot function financially under a costing methodology necessary to create the opportunity for effective competition, then there can be no competition and the national goals of the Act are not achievable. If these goals are not achievable, then Congress needs to rethink the Act based on an approach that in the local loop, there is an ineluctable natural monopoly that must prevail and be preserved. That being the case, the only place competition can take place is in the long distance arena. In turn then, given the bottleneck control of the local loop, which would then be preserved, ILECs cannot qualify to enter the long distance arena.[3]

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[3] Perhaps, Congress and the Commission should consider bringing a condemnation proceeding, nationalizing the local loops after paying fair market value as determined in such a proceeding, creating a quasi-government corporation to take over the local loops and providing access to all competitors through such a corporation.

In addition to the reasons presented to discount the ILECs' concerns, the Commission may also consider the following. The ILECs express no concerns about operating below costs, and substantially below costs, when it comes to other areas. Recently, several ILECs submitted studies to the Commission about the impact of Internet access. These studies demonstrate that the ILECs are expending substantial sums to provide Internet access which they cannot recoup.[4] While the ILECs have argued that this situation does need correcting, and that the situation arises from Commission rules, no argument has been made that an unconstitutional taking is occurring.

On the contrary, these same ILECs have actually undertaken to offer their own Internet access. The ILECs are, therefore, participating in worsening a situation in which service is being provided substantially below the cost to provide it. Ostensibly, the ILECs' view providing this subsidy for Internet as both short-lived (expecting the Commission to fix the problem in the near term) and worth the risk (to gain market share in a rapidly developing, but still uncharted area where profitability has not been demonstrated). The TELRIC pricing model should be viewed the same, but apparently the actual thought of real competition in the local loop is still too harsh a reality to be accepted.

Some 20 to 25 years ago, when AT&T and the BOCs were one, the theory of long-run incremental cost was embraced and promoted. The Commission might find a review of this effort instructive here. At that time, AT&T, faced with the beginnings of competition from a still nascent MCI, wanted to use LRIC as the basis by which to price its services which were competitive to what MCI was able to offer. As a monopolist facing its first real competition, AT&T sought to use LRIC because it would have permitted AT&T to exclude from its costs its embedded cost base. This

[4] See "Supplement" filed August 16, 1996, in FCC Rulemaking No. 8775.

would, in turn, allow AT&T to price its services lower in order to match MCI's ostensibly lower prices to end users.[5]

In short, costing models are used to achieve pricing goals all the time. When AT&T was a monopoly, it used LRIC in attempt to defeat competition by excluding certain costs in order to offer lower prices. Here, the monopoly ILECs oppose this same costing methodology because they, too, want to defeat competition. Only this time, since the prices that will be affected will be the ILECs' competitors, the costs excluded are sought to be included. In that way, the competitors will have to raise their prices or suffer slim to non-existent margins. The result will be to discipline the new competitors and keep them from gaining market share.[6]

The ILECs' wish to use the states, without federal guidelines, is transparently self-serving. The ILEC community tried mightily to skirt Commission oversight by claiming that the states had sole authority over access charges and that there was no need to file access tariffs with the

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[5] See, In the Matter of American Telephone & Telegraph Co. and the Associated Bell System Companies Charges for Interstate and Foreign Communication Service, et seq., Docket No. 16258, et al., 18 F.C.C. 2d 761 (1969); In the Matter of American Telephone & Telegraph Co. Charges, Regulations, Classifications and Practices for Voice Grade/Private Line Service (High Density-Low Density) Filed with Transmittal No. 11891, 55 F.C.C. 2d 224 (1975); Private Line Rate Case (Docket No. 18128 Decision), 61 F.C.C. 2d 587 (1976), recon., 64 F.C.C. 2d 971 (1977), further recon. 67 F.C.C. 2d 1441 (1978); In the Matter of American Telephone & Telegraph Company Charges for Private Line Services Revisions of Tariff F.C.C. Nos. 260, 264 and 266 filed in Transmittal Nos. 12546, 12716, and 12927 (Series 2000/3000), 74 F.C.C. 2d 1 (1979).

[6] In a yet further revealing disclosure of true motivations, the ILECs actually base their opposition to the Commission's First Report on the fact that it might actually allow competitors to gain market share (Joint Motion @ 30-35). Additional clarification will be required by this organization if the concept of the ILECs in welcoming competition in the local loop is based on the condition that there is, in fact, no loss of customers to them.

Commission.[7] Their attempt to nestle in with the states, to the exclusion of the Commission, failed then as it should now.[8]

C. There is No Irreparable Harm and the Public Interest Will Be Harmed By A Stay.

The ILECs' claims of irreparable harm ring hollow. Their assertion of the public interest is poor camouflage for the delays and avoidance of responsibility truly at stake. Look at the list of contracts in negotiations. Attempt to find a small carrier listed. If there be one or two, what about the hundreds not listed? ILECs have drug their feet as much as possible and will continue to do so. Whether it be by refusing to file contracts with the states to prevent disclosure of what is standard practice so as not to have to offer the same services to new competitors (GTE) or simply refusing to negotiate any contracts until some all-encompassing global version is created (U S WEST), delay serves the interests of the entrenched monopolists.

Nothing in the Commission's rules and guidelines require knee-jerk compliance. If cherry-picking the favorable terms of an existing agreement truly raises questions about unfair burdens or improperly compensated services, there are procedures in place to address and fix such problems. The ILECs know this. Their opposition, nonetheless, again reveals not meritorious concerns, but obstructionism and pique. More importantly, it should convey to the Commission and Congress the

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[7] Bell Tel. Co. of Pa. v. FCC, 503 F.2d 1250 (3rd Cir. 1974), cert denied, 422 U.S. 1026 (1975); Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 F.C.C. 2d 413 (1974), aff'd. sub. nom., 503 F.2d at 1250.

[8] It is not all that clear that the states desire total discretion. At least one state, Texas, was forthright enough to realize that its local constraints were blocking the ability to open the local loop market to competition and sought Commission action to alleviate the situation. See, Petition of Public Utility Commission of Texas for Expedited Declaratory Ruling, May 10, 1996, FCC File No. CCBPol 96-13, DA 96-750, released May 15, 1996.

critical need for oversight and tough approaches on enforcement. Ignoring the rhetoric spewed forth by the "competition-loving" ILECs, the reality is that few, if any, have moved out of the dark ages and continue to covet their rich monopolistic fiefdoms.[9] Nothing but full scale dedication to swift and decisive enforcement of the goals and policies of the Act and the federal guidelines, coupled with maintaining the barricades against ILEC entry until the latters' bulwarks have crumbled or been leveled will secure competitive entry in the closed markets maintained and guarded by the ILECs.

Respectfully submitted,

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[9] While crying "poor mouth," the facts are to the contrary. See attached clipping from the Wall Street Journal, p. B-1, September 3, 1996. On September 25, 1995, the Wall Street Journal, p. A-16, published the results of an analysis of the RBOCs' stock performance since the 1984 Divestiture. The results are shown in the attached table and demonstrate that each RBOC outperformed AT&T during this period indicating, beyond a doubt, their financial soundness.

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MARKETPLACE

Health: *Study finds managed care behind 4% drop in doctors' income* **Page B6.**

Law: *Joined tobacco probes shift focus to U.S. companies' claims* **Page B9.**

Baby Bells Profit by Tapping Phone Paranoia

By Gautam Naik
Staff Reporter of The Wall Street Journal

ROSLYN CRUMP HAS A FORMIDABLE arsenal of phone services at her beck and call. One feature continuously dials a busy number until the call breaks through. Another blocks calls placed from specific telephones. She also has Call Waiting, three-way calling and a device that displays a caller's name as well as number.

"Anything that makes my life easier is good for me," says Ms. Crump, a customer of Bell Atlantic Corp. in Silver Spring, Md. "And sometimes I don't feel like talking to certain people."

The snazzy extras fatten Ms. Crump's phone bill each month—and that is just the point. The Baby Bells and other local phone companies charge stiff monthly fees of up to $8 for each new service, reaping lush profit margins in the process. All told, the Bells and GTE Corp. rake in more than $4 billion a year on these new services, and the take is growing.

Randall Enos

For the better part of a century, phone service was simple and unadorned. Even the industry dismissed it as POTS: Plain Old Telephone Service. But thanks to new technology, the dull dial-tone network is quietly becoming a web pulsing with a newfound "intelligence." Its copper and fiber tentacles reach into every home and business. It can recognize your voice. It can follow you wherever you go. It knows which callers you like, and which you hate. And that, the phone companies assure us, is only a taste of what is to come.

"It's the beginning of a whole host of telephone services that can be used to identify the caller in one way or another," says Charles H. Kennedy, communications law professor at Catholic University in Washington. "Consumers are losing the privacy of their phone number."

Many of the newer services read like a wish list for the paranoid. Selective Call Acceptance lets only calls from certain preset numbers come through, blocking the rest. Call Block lets all calls through except those from specified phone numbers (though a determined harasser could still switch phones). Call Return, activated by pressing *69, redials the number of the last incoming call, offering retaliation for hang-ups. (Sometimes, *69 users can even retrieve the caller's number via a recorded message, although this feature is banned in some states as an invasion of privacy.)

Other add-ons offer convenience rather than surveillance. One service lets a single-line home have up to six phone numbers, one for each family member, with a distinctive ring for each. PepsiCo Inc.'s Pizza Hut unit uses a BellSouth Corp. service, ZipConnect, to let customers in five states call a single toll-free number and automatically reach the outlet nearest them. David Foster, a general contractor in Los Angeles, subscribes to GTE's In Contact service, with which he forwards home, work or cellular calls to wherever he is on a particular day. "To me, contact is business," he says, although he concedes "some people would prefer not to be bugged."

The newfangled services all depend on more intelligent software. In the past, offering a new service required the installation of new software at thousands of individual switches, the powerful computers that route calls. Now the Bells install new programming in a handful of master computers, known as Service Control Points, which then relay directions to the switches. Thus, carriers now can introduce some services in one year instead of three.

Once the software is up and running, it costs a carrier virtually nothing to add a new customer. And the profit margins of 70% or more far exceed the less-than-10% profit that regional carriers typically get on basic phone service. Revenues from the new "smart" services could grow more than 50% in the next five years, projects Brian Adamik, an analyst at Yankee Group, a Boston research firm.

The most popular—and perhaps most Orwellian—service is Caller ID. With a special device that can cost as much as $200, plus a monthly fee of about $6, a user can see a caller's number or name on a tiny screen. Long-distance callers, shielded in the past, are now included in the service

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RBOC STOCK PERFORMANCE SINCE 1984 DIVESTITURE

WALL STREET JOURNAL, SEPTEMBER 25, 1995
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A COMPARISON WAS MADE OF THE TOTAL RETURN INDEXES - PRICE CHANGE PLUS REINVESTED DIVIDENDS - FOR THE RBOC STOCKS, AT&T AND THE MARKET IN GENERAL WITH FEB. 16, 1984 = 100 (DATA THRU 9/19/95).

COMPANY	INCREASE FROM BASE OF 100	MARKET OVERALL
AMERITECH	910	575
BELL ATLANTIC	725	575
BELLSOUTH	700*	575
NYNEX	610	575
PACIFIC TELESIS	700	575
SBC	1050	575
US WEST	650	575
AT&T	595	575

*BELLSOUTH ANNOUNCED A 2-1 STOCK SPLIT AND RAISED DIVIDENDS 4.3%, (AN ANNUAL INCREASE OF $60 MILLION ON NORMAL $1.36 BILLION PAID EACH YEAR) THE FIRST DIVIDEND INCREASE IN 4 YEARS SIGNALING CONFIDENCE IN FUTURE EARNINGS. WSJ 9/27/95, P.C22. STOCK ROSE 1.7% ($1.25) TO $72.875.

CERTIFICATE OF SERVICE

I, Suzanne M. Helein, a secretary in the law offices of Helein & Associates, P.C., do hereby state and affirm that copies of the "Opposition of America's Carriers Telecommunication Association to the Joint Motion of GTE Corporation and the Southern New England Telephone Company for Stay Pending Judicial Review" in CC Docket No. 96-98, were served in the manner indicated, this 3rd day of September, 1996, on the following:

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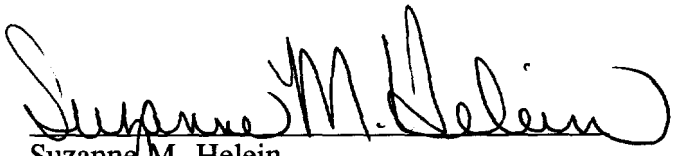

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